No. 8397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from a decree in a suit arising under the Copyright Act (Tr. p. 2). The District Court had jurisdiction under subsection (7) of section 24 of the Judicial Code (U.S.C. 28:41):

> "The district courts shall have original jurisdiction as follows:
> * * * * * * *
> (7) * * * all suits at law or in equity arising under the * * * copyright * * * laws."

This court has jurisdiction upon appeal to review the District Court's decree under section 128 of the Judicial Code (U.S.C. 28:225):

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions——

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345[1] of this title."

STATEMENT OF THE CASE.

At least since October, 1908, appellee has been compiling and publishing two directories of certain of its telephone subscribers entitled first, "Telephone Directory, San Francisco and Bay Counties," herein called "San Francisco directory" (Ex. 1[2]) and second, "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties," herein called "Oakland directory" (Ex. 2). Appellee has published these directories with notice of copyright and has received certificates of copyright therefor since October, 1908 (Exs. 7 and 8, Tr. p. 45).

The San Francisco directory is arranged in four sections: first, an alphabetical listing of appellee's San Francisco subscribers; second, a classified listing of appellee's San Francisco subscribers; third, an alphabetical listing of appellee's Oakland, Alameda, Berkeley and San Leandro subscribers, and, fourth, an alphabetical listing of appellee's subscribers in other cities and towns in the Bay area, which includes a number of the smaller towns in the vicinity of San Francisco. The Oakland directory is likewise arranged in four sections: first, an alphabetical

1. U.S.C. 28:345 is not involved in this case.
2. The original exhibits were, by order of court (Tr. pp. 119-122), filed with the clerk of this court and made a part of the record in this case.

listing of appellee's Oakland, Alameda, Berkeley and San Leandro subscribers; second, the Oakland, Alameda, Berkeley and San Leandro classified section; third, an alphabetical listing of appellee's San Francisco subscribers, and, fourth, an alphabetical listing of appellee's subscribers in other cities and towns in the Bay area, the same, in this respect, as the San Francisco directory.

The San Francisco alphabetical section of the May, 1935, issue contained 160,266 listings and the Oakland alphabetical section 97,512 listings, representing 243,100 telephones in service in San Francisco and 120,784 in Oakland, Alameda, Berkeley and San Leandro (Tr. p. 56).

The alphabetical sections of these directories are prepared in the following manner:

An applicant for telephone service signs an application card[3] which contains the listing as it appears in the directory. From the application card, appellee's business office prepares an order for the installation of a telephone. A copy of this order is sent to appellee's directory department for use in compiling the new directory.

The manuscript[4] for a new directory is prepared by cutting up the columns of the last directory and pasting them on sheets of paper. As the directory department is advised, by order from the business office, of changes to be made in the old directory, the old listing, if dropped or changed, is crossed out and the new one, if any, is typed out on the column next to the column cut from the old directory (Tr. pp. 56-57).

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3. Exhibit 9 is an application card.
4. Exhibit 3 is manuscript used in compiling the May, 1935, San Francisco directory.

Appellee made 109,407 of such changes in the San Francisco alphabetical section manuscript from the time the May, 1935, directory was issued until the next directory was issued in 1936. For the Oakland alphabetical section there were 60,751 such changes during the same period. It cost appellee $295,222 to compile, publish and distribute the May, 1935, issues of the San Francisco and Oakland directories (Tr. pp. 59-60).

In 1935 the appellants published and sold to the public numerical telephone directories entitled "Numerical Telephone Directory, San Francisco and Other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935" (Exs. 5 and 6, Tr. p. 61). The material in appellants' directories was copied entirely and exclusively from the alphabetical sections of appellee's San Francisco and Oakland directories, and no other source was used to obtain the information appearing therein (Tr. p. 77). The appellants copied the information in the following manner: A page was taken from the alphabetical section of appellee's directory and the listings on the back of the page were ruled out. The page was cut into the columns into which it was divided and thereafter the alphabetical listings in each column were in turn cut out. The listings so cut out were then placed in boxes classified according to the prefix of the telephone number; for example, the listing "Pillsbury Madison & Sutro attys 225 Bush GArfld 6133" was placed in a box marked and containing "Garfield" listings. After this had been done, the listings were removed one at a time from the boxes and arranged upon loose

leaf binder pages[5] in numerical order according to the telephone number and then pasted to the pages. Typewritten sheets then were made from these pages, and in so doing the order of each listing was reversed so that the telephone number preceded the name (the prefix and the address being omitted) so that, in the example given, the specimen listing would read "6133 Pillsbury Madison & Sutro". The typewritten sheets, thus made up, were proof read against the pasted binder pages and sent to the printer as copy from which to print the numerical telephone directories. This process was followed until each listing in the alphabetical sections of appellee's San Francisco and Oakland directories was covered. Appellants did no independent canvassing or collection of information, or even verification of the information, in compiling their directories (Tr. pp. 91-93).

A comparison of 1000 listings in appellee's May, 1935, San Francisco directory with the corresponding listings in appellants' San Francisco numerical telephone directory showed the latter to be approximately fourteen per cent erroneous. Some of the errors consisted of omitted listings and some were incorrectly spelled (Tr. p. 101).

The questions thus involved are (a) whether appellee's copyrights of its directories are valid and (b) whether appellants, by copying the information into their directories, have infringed the copyrights. These questions are raised by the assignment of errors to the findings of fact, to the conclusions of law and to the District Court's decree.

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5. The appendix contains a photostatic copy of Exhibit 15 which is one of appellants' loose leaf binder pages.

SUMMARY OF THE ARGUMENT.

1. Appellee has a valid and subsisting copyright for its May, 1935, directories and those issues preceding it since October, 1908.

2. Appellee's copyright of its alphabetical telephone directories protects it against the copying of the alphabetical as well as of the other sections of the directories.

3. Appellants' copying of material from appellee's directories is not a fair use of them, but an infringement of appellee's copyright.

4. Independently of any other consideration, the doctrine of "fair use" should not be invoked in cases where its application would result in harm to the proprietor of the original work.

5. The District Court properly held that Dagmar Leon was liable as an infringer; she actively assisted in the compilation of appellants' directories, sold them to the public and offered to sell the business of appellants to appellee.

ARGUMENT OF THE CASE.

1. APPELLEE HAS A VALID AND SUBSISTING COPYRIGHT FOR ITS MAY, 1935, DIRECTORIES AND THOSE ISSUES PRECEDING IT SINCE OCTOBER, 1908.

The Copyright Act specifically provides that directories may be copyrighted.

Section 5 (a) of the Copyright Act (U.S.C. 17:5) is as follows:

> "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, *directories,*[6] gazetteers, and other compilations; * * *."

In the following cases the courts recognized that directories may be copyrighted and that the owner of the copyright is entitled to protection from infringement:

Jeweler's Circular Pub. Co. v. Keystone Pub. Co. (2nd C.C.A., 1922), 281 Fed. 83;

Sampson & Murdock Co. v. Seaver-Radford Co. (1st C.C.A., 1905), 140 Fed. 539;

Produce Reporter Co. v. Fruit Produce Rating Agency (D.C., N.D. Ill., 1924), 1 F. (2d) 58;

Social Register Ass'n. v. Murphy (C.C., R.I., 1904), 128 Fed. 116;

26 A. L. R. 585, annotation.

The District Court found that appellee had duly and regularly copyrighted each edition of its directories (from October, 1908, to May, 1935) and the Register of Copyrights at Washington had issued to it his certificate of copyright for each directory issue (Tr. p. 45). This finding is supported by the stipulation of counsel and appellee's Exhibits 7 and 8 (Tr. pp. 73-74). Appellants do not claim that this finding is erroneous.

Certificates of copyrights issued by the Register of Copyrights are prima facie evidence of the facts therein stated. Section 55 of the Copyright Act (U.S.C. 17:55) so provides:

"Said certificate (of copyright) shall be admitted in any court as prima facie evidence of the facts stated therein."

6. Italics throughout the brief are ours.

The appellants offered nothing to rebut this prima facie case and, that being true, it is sufficient proof of a valid copyright.

M. Witmark & Sons v. Calloway (D.C., E.D. Tenn., 1927), 22 F. (2d) 412, 413, holds:

> "There was introduced at the hearing a certificate of copyright registration under seal of the copyright office for this song, showing the copyright in the name of plaintiff. This certificate is prima facie evidence of the facts stated therein. 35 Stat. 1086, c. 320, sec. 55 (17 USCA sec. 55), this being the Copyright Act of March 4, 1909. There is nothing to contradict it, and it is therefore sufficient proof to establish a valid copyright in the plaintiff. Berlin v. Evans (D. C.) 300 F. 677."

Appellants contend that appellee's telephone directories are not copyrightable[7] for the following reasons. First, they argue that the compilation of appellee's directories is mere clerical routine, wholly devoid of originality, intellectual skill or literary value (App. Br. p. 9). This argument, however, assumes that it is necessary that a book contain matter having in it originality, intellectual skill or literary value, in order that it may be copyrighted. Such a contention would be applicable to the compilation of any directory regardless of the subject matter or method of arrangement and ignores the following considerations:

(1) The Copyright Act, section 5 (a) (U.S.C. 17:5) provides for the copyright of "directories" *without limitation as to subject matter or method of arrangement;*

7. In considering appellants' argument on this phase of the case, it is noteworthy that appellant, Fred S. Leon, published a notice of his supposed copyright in appellants' San Francisco directory (Ex. 5, Tr. p. 61).

(2) The courts have uniformly held that directories may be copyrighted. The annotation in 26 A. L. R. 585 lists the following as among the kinds of directories which have been held to be copyrightable: (1) general municipal or territorial directories; (2) business directories; (3) post-office directories; (4) a legal directory; (5) an East India calendar or directory; (6) a directory of illustrations of trade-marks; (7) a classified directory; (8) shipping lists; (9) a society directory; (10) a topographical directory of England; (11) a directory or code of words used in telegraphy; (12) a directory of race horses; (13) a directory of blooded horses; and (14) a list of hounds and hunts.

Regardless of these considerations, the District Court in the case at bar found (Finding V, Tr. p. 47):

> "The collection, editing, compilation, classification, arrangement, preparation of the material in said directories and the publication of said directories involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order."

As above stated, there were 160,266 listings in the alphabetical section of the San Francisco directory and 97,512 listings in the Oakland alphabetical section. The record shows that about one hundred people are regularly employed in appellee's directory department of whom eight work full time on the alphabetical directory and eight more work part time on it (Tr. p. 59). When it is considered that there were only seventy-seven errors in the entire number of 257,778 listings in the May, 1935, issues of appellee's San Francisco and Oakland directories (Tr.

pp. 23, 24), we submit that the finding, the publication of the directories "involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order", is amply supported by the evidence.

Second, appellants contend that there is a fundamental distinction (App. Br. p. 12) between the kinds of directories considered in the authorities cited by us and appellee's telephone directories. They argue that in the cited cases the publishers of the works accumulated the information for its independent value and not as a mere incident to the performance of a public service. Without conceding that that contention has any merit, we submit that a sufficient answer to it is that appellee's directories have a use and a value as street address directories independently of and apart from their use as directories for telephone numbers. It is common knowledge that appellee's directories are constantly being used for ascertaining addresses as well as for ascertaining telephone numbers.

National Tel. News Co. v. Western Union Tel. Co. (7th C.C.A., 1902), 119 Fed. 294 (erroneously cited in appellants' brief as 199 Fed. 294 (App. Br. p. 9)) is not, we think, an authority to the contrary. In that case the evidence showed that the Western Union Telegraph Company had collected news and dispensed it on its tickers to persons who paid for it. The National Telegraph News Company hired one of these tickers, took the news as it came over the ticker from the Western Union line and then transmitted the same news on its own tickers to its own subscribers. The court specifically recognized that directories were copyrightable. It said (p. 297):

"Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, *directories,* and other works of similar character."

A distinct reason was given for holding that the news appearing on the tickers was not copyrightable, as follows (pp. 298-299):

"Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded—the happening, as an happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word, the precommunicatedness of the information—is the essence of appellee's service; the quality that wins from the patron his patronage.

Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other out-put relating to business, and brought about by the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service; not Authorship, nor the work of the Publisher."

It is plain, therefore, that the reason for the decision in *National Tel. News Co. v. Western Union Tel. Co.,* supra, was because the court felt that the printed tape being merely an exchange of ordinary sightseeing is not a book or article. The appellee's directories are more or less permanent in nature, and clearly come under the designation of books.

The mere fact that the Supreme Court of California, in *California Fireproof Storage Co. v. Brundige,* 199 Cal. 185, 248 Pac. 669, said that a telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience, does not and could not prevent such a directory from being copyrightable. Appellants again ignore the plain language of the statute (Copyright Act, section 5 (a) (U.S.C. 17:5)) that directories may be copyrighted.

Even if the law required[8] the appellee to publish telephone directories, a valid copyright of such a directory could be had. In *Callaghan v. Myers,* 128 U. S. 617, it was argued that law reports, being public property, were not susceptible of private ownership and that the reporter of the opinions was not an author and therefore could not assert a monopoly in the result of his labors. The court said (p. 647):

> "But, although there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, *Banks v. Manchester, ante,* 244, yet there is no ground of public policy on which a reporter who prepares a volume of

8. There is no provision of the Public Utilities Act of the State of California (Cal. Stats., 1915, p. 115, Deering's Gen. Laws, 1931, Act No. 6386) requiring a telephone company to publish a telephone directory.

> law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor."

Finally, appellants ignore the fundamental protection which a copyright gives to a directory proprietor, namely, the protection of the labor which the proprietor has put into his compilation.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83, recognized the proprietor was entitled to this protection (p. 88):

> "The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work."

2. APPELLEE'S COPYRIGHT OF ITS ALPHABETICAL TELEPHONE DIRECTORIES PROTECTS IT AGAINST THE COPYING OF THE ALPHABETICAL AS WELL AS OF THE OTHER SECTIONS OF THE DIRECTORIES.

The appellants, it will be remembered, copied into their directories the portions of appellee's directories containing the listings of certain of its subscribers. They did not copy the introductory matter nor the classified advertising section. They contend that this being so, appellee is not protected against the copying of the alphabetical list of names, addresses and telephone numbers, claiming that "The law of copyright grants no monopoly in facts as such; but merely in the manner, form and style of presentation" (App. Br. p. 15). This argument, however, like the previous one (App. Br. p. 9), ignores the well-established rule that any directory, whether a telephone directory, a street address directory, a social directory, or a business directory, is copyrightable in its entirety.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,
281 Fed. 83, at 87, supra;
26 A. L. R. 585, 586.

As pointed out in the annotation in 26 A. L. R. 585, it is the labor, expense and authorship which the proprietor of a directory has put into his compilation that his copyright protects. As stated in the quotation from *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, supra, the validity of a copyright of a directory does not depend upon literary skill or originality, either in thought or in language, but merely upon industrious collection from original sources.

We submit that *Dymow v. Bolton* (2nd C.C.A., 1926), 11 F. (2d) 690, is not a decision to the contrary. The ques-

tion there involved was whether the defendant had copied a sufficient amount of material from the plaintiff's play to make him an infringer of the plaintiff's copyright. The court was not dealing with a case like the instant one, in which admittedly all of the information in the appellants' directories came from the appellee's directories. While it is true that the names and telephone numbers in the appellants' directories have been transposed and rearranged, still all of the material therein has been copied wholly and exclusively from appellee's books and has not been procured from original sources or, as above stated, even verified. The court, in *Dymow v. Bolton,* supra, dealt with no such situation.

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3. APPELLANTS' COPYING OF MATERIAL FROM APPELLEE'S DIRECTORIES IS NOT A FAIR USE OF THEM, BUT AN INFRINGEMENT OF APPELLEE'S COPYRIGHT.

Appellants seek to avoid the charge of infringement by claiming "fair use". They concede that all of the information contained in their numerical directories was taken bodily and solely from appellee's directories by cutting the listings from the pages of appellee's directories (App. Br. p. 18). They admitted that they did not verify any of the information so taken. This, they contend, was a fair use of the material and that such use is contemplated by appellee when it publishes its directories (App. Br. p. 20).

No one of the authorities relied upon by the appellants in this connection is a case involving a directory. Whatever may be the limits of the somewhat nebulous doctrine of "fair use" as applied to ordinary literary publications,

such as texts, novels, monographs, encyclopedias, etc. (as to which it is conceivable that the reproduction of excerpts and short passages is permissible), it is submitted that this doctrine has no application to directories. The very nature of a directory is a list or enumeration of special information relating to a given subject matter, presented in a short and condensed form. The statutory privilege accorded to persons, who publish information which they have collected and classified, to obtain the exclusive right to reproduce copies of their publication, in whole or in part, would be of no value if persons, like appellants, could reproduce such compilations in whole or in part. The law condemns such practices as those in which the appellants in the case at bar have engaged.

In *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83, the court said (pp. 94-95):

> "The correct definition of copyright is that given by Lord Cranworth in Jefferys v. Boosey, 4 H. L. C. 815, where he said that the true definition of 'Copyright' is the sole right of multiplying copies. That means that you must not copy matter copyrighted. No one can legally take the results of the labor and expense which another has incurred in the publishing of his work, and thereby save himself 'the expense and labor of working out and arriving at those results by some independent road.' The defendant undertook to save himself the labor and expense of arriving at his results by an independent road."

Such is the situation in the instant case. Appellants copied all the information appearing in their directories from appellee's directories. They made no independent canvass of appellee's subscribers. To use the language

of the court in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,* supra, they undertook to save themselves the labor and expense of arriving at their results by an independent road. This they cannot do under the doctrine of fair use.

The authorities cited by appellants (App. Br. pp. 22-23), as being analogous cases of fair use, do not bear out their contentions. In no one of them is there wholesale appropriation of the copyrighted work.

In *Brief English Systems v. Owen,* 48 F. (2d) 555, the court held the plaintiff had no copyright and there was no showing of copying.

In *G. Ricordi & Co. v. Mason,* 210 Fed. 277, all the defendant did was to take "extremely brief epitomes of the plots of the two operas" which were the subject of a copyright. Obviously, in such a case there is no copying.

The court in *Whist Club v. Foster,* 42 F. (2d) 782, said that the plaintiff had no copyright on the rules of auction bridge and besides there was no showing of copying.

In *Guthrie v. Curlett,* 36 F. (2d) 694, there was no showing of copying.

The dictum from *Sampson & Murdock Co. v. Seaver-Radford Co.* (1st C.C.A., 1905), 140 Fed. 539, clearly shows that the court, in making the statement quoted by appellants (App. Br. p. 23), did not have in mind a case, as the instant one, in which all of the information was copied, but only a case in which a limited amount of information was copied. This is evident from the last sentence of the quotation (p. 542):

"So it may be that the copying and rearranging of a *general* directory for a bona fide and *limited* purpose, such as compiling a *social guide,* may come within the same rule."

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4. **INDEPENDENTLY OF ANY OTHER CONSIDERATION, THE DOCTRINE OF "FAIR USE" SHOULD NOT BE INVOKED IN CASES WHERE ITS APPLICATION WOULD RESULT IN HARM TO THE PROPRIETOR OF THE ORIGINAL WORK.**

Apart from any of the rules of law protecting the appellee in its copyrights, the evidence shows that appellee has been harmed in the past by directories such as those of the appellants and that it will be harmed in the future unless appellants are enjoined as they are by the decree in this case.

The appellants contend (App. Br. p. 27) that their directories are intended and used for an entirely different purpose from that of appellee's directories. This being so, they argue that the doctrine of fair use is applicable to the instant case.

The reasons, however, assigned by the authorities (App. Br. pp. 26-27) for the applicability of the doctrine of fair use in the case of books used for different or non-competitive purposes are (a) that the demand for the original copyrighted work will not be diminished and (b) that the profits of the original proprietor will not be prejudiced or diminished by the use of the copyrighted material in the second work. In other words, the original proprietor will not be harmed financially by the use of his material in the second publication. Although there is no evidence in this case that the demand for appellee's

directories will be diminished or that its profits from the publication of its directories will be prejudiced or diminished, it is clear from the evidence that the copying by appellants into their own books of the information from appellee's books will be harmful to appellee in the operation of its telephone business.

The record shows that this is not the first experience that appellee has had with numerical telephone directories. Many years ago there was a numerical telephone directory in San Francisco with which appellee had "quite a lot of trouble" (Tr. p. 85). A subscriber of appellee would use that directory to obtain a telephone number and the number having been reassigned to another subscriber, the latter would receive calls intended for the subscriber who originally had the number. The second subscriber would complain to appellee about erroneous calls.

The record also shows that the publication and sale of appellants' numerical directory will result in harm to appellee and annoyance to its customers unless appellants are enjoined. A spot check of 1000 listings in both the San Francisco and Oakland directories showed that the listings as they appeared in appellants' books were fourteen per cent incorrect (Tr. pp. 100-101). If a person purchased a directory from appellants he would use it, appellants say, largely for the purpose of checking telephone numbers.

Appellee's directories at all times remain its property[9] (Ex. 13—Rule and Regulation No. 20). When appellee publishes a new directory, the new directory contains all of

9. Appellee does, however, sell a limited number.

the changes in listings which have occurred in the interval between the publication of the next preceding directory and the publication of the new directory. Appellee, upon the delivery of the new directories to its subscribers, takes from them, in so far as possible, all of the old directories. Thus, the circulation of appellee's directories is more or less temporary and the information contained in them is kept, as far as possible, up to date. Appellants' directories, however, are sold by them to the public. They remain the property of the purchasers and, therefore, have a permanent circulation (Tr. p. 87).

Appellee is constantly obliged to change telephone numbers. If one of its subscribers discontinues its service, appellee reassigns that number, after an interval, to another subscriber. Furthermore, appellee may change and reassign a number due to service reasons. The number, as reassigned, would be correctly inserted in the next issue of appellee's directory. But appellants' directories, being of permanent circulation, would still contain the obsolete information after appellee had published a new directory (Tr. p. 89).

Despite the utmost care on the part of appellee there are certain errors in listings in its directories. Appellants' directories, being wholly copied from them, repeat such errors. Appellee corrects them in the next issue of its directories. Appellants' directories, however, having, as above stated, a permanent circulation, continue to contain the errors.

The inaccurate copying by appellants into their directories of the information appearing in appellee's directories and the perpetuation (after the next issue of

appellee's directories has been published) of obsolete listings, due to reassignments of numbers and to errors appearing in appellee's books, inevitably lead to the annoyance of both appellee's customers and appellee itself and cause appellee additional expense. If apellee can confine its service of intercepting calls due to persons calling numbers which have been reassigned or changed to a minimum number of calls, it can save "quite a bit in expense" as the intercepting service is an expensive one (Tr. p. 89).

The fact that the public may be annoyed and a telephone company may be caused additional expense by the copying into other directories of the information contained in the telephone company's directories, received judicial recognition in *Cincinnati & Suburban Bell Telephone Co. v. Brown* (D.C., S.D. Ohio, 1930), 44 F. (2d) 631. In that case the court issued a preliminary injunction against the defendants, restraining them from publishing their directory. The pleadings showed that the defendants had copied into their telephone directory the material from the plaintiff's telephone directory. There was evidence that the plaintiff would be harmed by the copying because it was inaccurately done. The court said (p. 632):

> "I think there is somebody else interested in this proceeding; that is, the public. It has been stated that the Telephone Company is a quasi public corporation. The telephone has ceased to be a luxury and has become a necessity in all business houses and in substantially all homes; everybody that can afford it has a telephone. Therefore, to get out a list of this kind and represent that it is an accurate list of the numbers in the telephone book, no doubt, does

lead to confusion and results in extra maintenance cost that has been referred to by the officers of the company, and it is just that much more expense that every subscriber has to pay for the maintenance of his telephone service, and, if books like these issued by defendants continued to be gotten out, more operators would have to be employed to take care of the confusion caused, and, of course, the telephone company, in order to cover this expense, along with other added expenses, would apply for higher rates, and subscribers would have to pay higher rates. I understand that this is only a drop in the bucket, but drop upon drop fills a bucket; so it is here that all these things accumulate, and it puts the burden on the public, and the telephone has become such a useful instrument that it ceases—it has long ceased to be just a matter for the convenience of a few. Everybody uses it more or less, sooner or later.''

Appellants next argue that they are entitled to use the information appearing in appellee's books for the reason that appellee's books are the original source of the information appearing therein. Nothing, however, could be further from the fact. The subscribers to appellee's telephone service are the original source of the information appearing in appellee's books. From them and from them alone appellee finds out their names and addresses. True, appellee does assign the telephone numbers to them, frequently the ones which they desire. But appellants could have obtained from the subscribers their names, addresses and telephone numbers; this, however, they did not choose to do. Instead, they adopted a method easier and more economical to them—they simply copied into their own books all of the information they wanted from appellee's books.

5. THE DISTRICT COURT PROPERLY HELD THAT DAGMAR LEON WAS LIABLE AS AN INFRINGER; SHE ACTIVELY ASSISTED IN THE COMPILATION OF APPELLANTS' DIRECTORIES, SOLD THEM TO THE PUBLIC AND OFFERED TO SELL THE BUSINESS OF APPELLANTS TO APPELLEE.

During the trial of the cause the appellant, Dagmar Leon, made a motion to dismiss the bill of complaint as to her. This the trial court denied. Its denial, we submit, was proper in view of the following evidence:

The testimony showed that Dagmar Leon, who is the wife of the appellant, Fred S. Leon, "worked right along" with him in compiling the directories and cooperated in the production of the book. She made sales of the directories over the counter at appellants' office in the Monadnock Building in San Francisco (Tr. p. 95).

More significant, however, than the testimony, is the letter (Ex. 16), mention of which is omitted from appellants' brief. It was written prior to the commencement of this suit, is addressed to Mr. A. C. Calendar, a district manager of appellee in San Francisco, on the letterhead of Numerical Telephone Directory, and is as follows:

"Dear Mr. Calendar:

Because of the fact that we are finding the financial struggle too steep and because we have been offered a price for our business as it now stands, ready to go to press, we are writing to inquire whether or not the Pacific Telephone Company would be interested in making us a bid.

The offer presented to us is 50% cash and the balance to come out of the profits on the book. We are particularly interested in receiving all cash at this time inasmuch as we have an opportunity of buying into a line of business (the pure food business) in which we have been keenly interested in get-

ting a foothold for a number of years. If immediately taken over it will give us an opportunity of preparing for the Christmas trade. It also happens that we are not the only ones interested in this particular business so we realize that we must act at once.

If the Telephone Company is interested in talking this matter over with us, we will agree to circularize our subscribers, the Better Business Bureau, Chamber of Commerce, etc, which will cover a large portion of the most important business houses in the City, giving for our reason for discontinuance whatever you advise.

We are to meet our prospective buyer on Tuesday afternoon (Oct. 1st.) for the purpose of closing the deal.

Respectfully,

Dagmar Leon."

It will be noted that throughout the letter the appellant, Dagmar Leon, continually uses the first person plural pronoun. She refers to the fact that "*we* are finding the financial struggle too steep"—"*we* have been offered a price for our business"—"*we* are writing to inquire whether or not the Pacific Telephone Company would be interested in making *us* a bid." There is only one possible construction of this letter, namely, that appellant, Dagmar Leon, considered herself as one of the proprietors of the business.

The finding of the District Court (Finding VII, Tr. p. 47) that both defendants compiled, published and sold the infringing books is, we submit, correct in view of this evidence.

CONCLUSION.

We respectfully submit that the decree of the District Court granting a permanent injunction against appellants should be affirmed for the following reasons:

1. The appellee has complied with the Copyright Act in copyrighting its directories.

2. Such directories are copyrightable.

3. The appellants infringed the appellee's copyright by admittedly copying all the material into their directories from appellee's directories without verifying it or checking it in any way.

4. The District Court properly denied the appellant's, Dagmar Leon's, motion to dismiss the bill of complaint as to her.

Dated, San Francisco,
April 5, 1937.

Respectfully submitted,
ALFRED SUTRO,
NORBERT KORTE,
SAMUEL L. WRIGHT,
Attorneys for Appellee.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Appendix Follows.)

Appendix.

Plaintiff's Exhibit No. 15

Indin A M r 1537-8th Av.....LO ckharn-4621

Cooke K S r 1431-5th Av.....LO ckharn-4624

Cooke J G r 1431-5th Av.....LO ckharn-4624

Allrad Clifford S rl est
Main Office 2408-14th Av.....LO ckharn-4632

Lindenmayer John H r 36 Linares...LO ckharn-4634

Haley Michael J r 1406-7th Av...LO ckharn-4637

McKinnon Calvin A r 1501-43rd Av.LO ckharn-4638

Williams Lois E r 1501-43rd Av...LO ckharn-4638

Bray W 1202 Cole.....LO ckharn-4643

Harrold Charles Mrs r 1552-18th Av.LO ckharn-4644

Colcate H r 52 Agua Way.....LO ckharn-4645

Dinwiddie J E r 1691-25th Av...LO ckharn-4646

Longmore J R r 2311-26th Av....LO ckharn-4649

Purdum John B r 1501 Lincoln Way.LO ckharn-4653

Fogarty Joseph F r 2551-16th Av..LO ckharn-4656

Thompson M Mrs r 529 Kirkham...LO ckharn-4658

Reardon Michael W r 2551-20th Av.LO ckharn 4659

Crandall E R r 2212-9th Av.....LO ckharn-4660

Levy Theodore M r 40 Santa Clara...LO ckharn-4662

Phillen Edward W r 715 Ulloa....LO ckharn-4666

Toel George E r 11 Hernandez.....LO ckharn-4667

O'Dea M A r 1401 Irving.....LO ckharn-4671

Schmuki B E r 1436 Moraga.....LO ckharn-4679

Sivley Geo C r 220 Vasques.....LO ckharn-4680

Rowe H E Miss r 1495-7th Av....LO ckharn-4683

Murphy Daniel J r 1392 Funston Av..LO ckharn-4684

Cohen Jos G r 215 Vasques.....LO ckharn-4686

Bost Crawford Dr r 115 Terrace Dr..LO ckharn-4690

Washington Geo r 244 Rivoli.....LO ckharn-4692

Garrigues Fred r 225 KensingtonWay.LO ckharn 4704

Vendt Albert Jr r 2701 Kirkham...LO ckharn-4706

Sinclair Wm J r 1283-37th Av....LO ckharn-4707

Robinson Reed W r 125 Terrace Dr..LO ckharn-4709

Warden Fred r 1619-26th Av.....LO ckharn-4711

Casnacci Edward P r 1503 29th Av.LO ckharn-4715

Stickel Bertha Mrs r 138 Hugo...LO ckharn-4717

Rogers Herbert r 450 Magellan....LO ckharn-4719

Bell S Mrs r 1267 20th Av.....LO ckharn-4725

Wiegner F L r 1495-7th Av.....LO ckharn 4728

Johnson August r 2512-19th Av.LO ckharn-4742

Barker G W r 100 Quintara.....LO ckharn-4743

Wallace Lilllan r 2438 Funston...LO ckharn-4744

MacCarty Frederick L r
1 San Lorenzo Way.LO ckharn-4746

Smith Curtis E Dr r 1 S Lorenzo Way LO ckharn-4746

Braida Maddaline r 1342-6th Av...LO ckharn-4747

Ross John W r 1342-6th Av.....LO ckharn-4747

Knipscher F W r 266 Santa Paula..LO ckharn-4748

Williams G T r 90 Lopez.....LO ckharn-4754

Anthony J E r 39 Rockwood Court..LO ckharn-4758

Lindenstadt B r 821 Cole.....LO ckharn-4759

Remegie Louis P r 2143-15th Av..LO ckharn-4765

Brandlein George O r 2015-17th Av LO ckharn-4767

Stone W K r 2514-26th Av.....LO ckharn-4773

White Lloyd C r 2514-26th Av....LO ckharn-4773

Blincoe C O r 2663-15th Av.....LO ckharn-4775

Williams Evan C r 2879-21th Av..LO ckharn-4782

Moore John F r 1639-25th Av....LO ckharn-4790

Bruns J H r 74 Ventura Av.....LO ckharn 4791

Keane H J Mrs r 206 Judah.....LO ckharn-4793

Berire J S Mrs r 225 Castenada....LO ckharn-4795

Giles Jennie M Mrs r 1463-19th Av LO ckharn-4796

Ouillard John J r 2470-24th Av...LO ckharn-4798

Van Nostrand L r 60 Ravenwood Dr. LO ckharn-4799

Shen T T Dr r 1657-8th Av.....LO ckharn-4800

Joyce G K r 158 Taraval.....LO ckharn-4807

Coyne W E S r 1387 15[illegible] Av.....LO ckharn 4810

Ransom Eugene S r 1360-16th Av.LO ckharn-4814

Crawford Donald A r 721 Ulloa....LO ckharn-4819

Kane Geo P r 430 West Portal Av..LO ckharn 4820

Pastry Palace 129 West Portal Av..LO ckharn-4824

Clark Frank Mrs r 9 Hi[illegible] ..LO ckharn 4826

Umland Chas W Mrs r 2540-22ndAv.LO ckharn-4827

Maillioux E G r 1335-30th Av....LO ckharn-4830

Baker Fred T Mrs r 3027 LincolnWy LO ckharn-4833

Harris Marshall C r 1401 Willard..LO ckharn-4834

Jones Howard W r 810 Rockdale Dr.LO ckharn-4839

Rosenthal L Mrs r 2326 33rd Av..LO ckharn-4842

Christensen Louis H r 2515-16thAv LO ckharn-4845

White J E r 110 Edgewood.....LO ckharn-4848

Emge Ludwig A Dr r 109 Edgewood.LO ckharn-4849